No. 02-658

Supreme Court, U.S.
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In The
Supreme Court of the United States

STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR ENVIRONMENTAL DEFENSE, THE NATIONAL PARKS CONSERVATION ASSOCIATION, THE NORTHERN ALASKA ENVIRONMENTAL CENTER AND THE ALASKA COMMUNITY ACTION ON TOXICS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

Environmental Defense (formerly the Environmental Defense Fund) is a national nonpartisan, nonprofit organization representing more than 300,000 members nationwide. Since 1967 it has linked science, economics, and law to create innovative, equitable, and cost-effective solutions to the most urgent environmental problems. Environmental Defense has helped design such landmark clean air programs as the market-based pollution cap and allowance trading program adopted in the 1990 Clean Air Act amendments to abate acid deposition. Protecting public health and the environment from harmful airborne contaminants is a core organizational mission.

The National Parks Conservation Association ("NPCA") is the only nonprofit citizen organization solely dedicated to protecting, preserving and enhancing the U.S. National Park System for the benefit of present and future generations. Founded in 1919, NPCA currently has over 300,000 members from all fifty states. NPCA has a longstanding interest in the use of the Clean Air Act and the federal government's responsibility to protect air quality and visibility in National Park units, including the Noatak National Preserve and the fifteen other National Park units in Alaska.

The Northern Alaska Environmental Center (Northern Center) promotes environmental conservation in Interior and Arctic Alaska through advocacy, education, and sustainable resource stewardship. The organization is a leading conservation voice for Interior and Arctic Alaska. Northern Center was founded in 1971 by a group of

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[1] Pursuant to Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and that no person or entity other than *amici* made a money contribution for the preparation or submission of this brief. This brief is being filed with the written consent of the parties, and the corresponding documentation is simultaneously being filed with the Court.

concerned residents and now has 1,100 members, of which 40% are from the Fairbanks area. Northern Center has members who visit, recreate, and rely on the natural resources of the Red Dog Mine region. True to its grassroots origins, Northern Center focuses on projects, such as enforcement of environmental protections at the Red Dog Mine, responsive to its members' concerns.

The Alaska Community Action on Toxics ("ACAT") is a nonprofit organization based in Anchorage. Its mission is to protect human health and the environment from the effects of toxic contaminants, and it represents about 300 Alaska residents. ACAT is dedicated to achieving environmental justice and ending production and release of toxic chemicals.

STATEMENT

Petitioner challenges orders of the United States Environmental Protection Agency ("EPA") pursuant to Sections 113(a)(5) and 167 of the Clean Air Act ("CAA" or "Act"), 42 U.S.C. §§ 7413(a)(5), 7477, prohibiting construction of a new power generation unit, known as MG-17, operated by Teck-Cominco, Inc. ("Cominco"), at the Red Dog Mine in northwest Alaska. EPA issued the orders after concluding that Cominco's permit, granted by petitioner as permitting authority, failed to comply with the Act's requirement that major emitting facilities install the "best available control technology" ("BACT") to prevent significant deterioration of air quality. 42 U.S.C. § 7475(a)(4). Petitioner approved the use of a control technology approximately one-third as effective as another it had identified as technically feasible, environmentally preferable, and economically affordable, on the basis of unspecified "competitive impacts" and the company's "contributions" to the region. The court of appeals upheld EPA's authority to enforce the BACT requirement.

The Clean Air Act. The Clean Air Act amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676, were enacted "to protect and enhance the quality of the Nation's air

resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b).[2] They represented "a drastic remedy to what was perceived as a serious and otherwise uncheckable problem of air pollution," *Union Elec. Co. v. EPA*, 427 U.S. 246, 256-57 (1976), and followed a series of prior congressional efforts to encourage states to address that problem. *See Train v. NRDC*, 421 U.S. 60, 63-67 (1975).[3] Still, Congress preserved a central role for the states, establishing an intricate "partnership," under which the states could, if they chose, assume responsibility for implementing some of the Act's central regulatory programs.[4]

Subject to qualifications required by its notorious complexity, the Act adopts two basic approaches to structuring the federal-state partnership. *See* John P. Dwyer, *The Practice of Federalism Under the Clean Air*

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[2] The 1970 amendments, Pub. L. No. 91-604, 84 Stat. 1676, amended the Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392. The Act was again comprehensively amended in 1977, Pub. L. No. 95-95, 91 Stat. 685, and 1990, Pub. L. No. 101-549, 104 Stat. 2399. It is codified at 42 U.S.C. §§ 7401 *et seq.*

[3] *See, e.g.*, Arnold W. Reitze, Jr., *The Legislative History of U.S. Air Pollution Control*, 36 Hous. L. Rev. 679, 684-702 (1999); Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 Md. L. Rev. 1141, 1155-57 (1995). On pre-1970 state regulation, *see* David P. Currie, *Air Pollution: Federal Law and Analysis*, §§ 1.08-1.12 (rev. ed. 1991); 1 Senate Comm. on Public Works, 93d Cong., 2d Sess., *A Legislative History of the Clean Air Act Amendments of 1970*, at 123-25 (Comm. Print 1974). On other rationales for federal regulation, *see* Richard B. Stewart, *Pyramids of Sacrifice: Problems of Federalism in Mandating State Implementation of Federal Environmental Policy*, 86 Yale L. J. 1196, 1212-13 (1977), and Daniel Esty, *Revitalizing Environmental Federalism*, 95 Mich. L. Rev. 570 (1996).

[4] *General Motors Corp. v. EPA*, 496 U.S. 530, 532 (1990); *see* 42 U.S.C. § 7401(a)(3) (CAA provision dating from 1963 Act stating that "air pollution prevention * * * and air pollution control at its source is the primary responsibility of States and local governments").

Act, 54 Md. L. Rev. 1183, 1193-96 (1995). One is to establish federal goals for air quality while leaving states discretion to select measures necessary to meet the federal air quality goals. This approach is exemplified in the 1970 amendments' provision for national ambient air quality standards ("NAAQS"). 42 U.S.C. §§ 7408, 7409(a). States were to prepare and submit for EPA review and approval state implementation plans ("SIPs") providing for implementation, maintenance, and enforcement of the NAAQS, 42 U.S.C. § 7410, but state plans could include "whatever mix of emissions limitations" on existing pollution sources the state chose to meet the national standard. *Train*, 421 U.S. at 79.

Congress has typically taken a markedly different approach, based on "direct federal regulation," for new or expanded stationary sources. Currie, *Air Pollution*, § 3.01 at 3-2. For such sources, the Act imposes technology-based national standards to "force" the development of new control technologies, *see Union Elec.*, 427 U.S. at 457, and to constrain states' incentives to under-protect air quality to attract business and to shunt pollution onto other jurisdictions. *See*, *infra*, pp. 18-20. For example, the New Source Performance Standards ("NSPS"), introduced in 1970, require new and modified sources to meet technology-based standards set by EPA based on "the best system of emission reduction * * * adequately demonstrated." 42 U.S.C. § 7411(a)(1).

As developed below, this fundamental distinction between state discretion to set and allocate controls for existing sources and federal technology-based requirements for new or modified sources is reflected in the prevention of significant deterioration program.

The Prevention of Significant Deterioration Program. In *Sierra Club v. Ruckelshaus*, the court held that the Act's purpose to "protect and enhance" the nation's air quality,

42 U.S.C. § 7401(b)(1), prohibited EPA or states from allowing substantial increases in air pollution levels in relatively "clean" areas meeting the NAAQS.[5] In response, in 1974 EPA promulgated an administrative "prevention of significant deterioration" ("PSD") program under which new or expanded pollution sources would be required to adopt the "best available control technology."[6]

Congress enacted a statutory PSD program as part of the comprehensive 1977 amendments. 42 U.S.C. §§ 7470-7479. To ensure that states did not allow air pollution levels in "clean air" areas to degrade toward "bare compliance" with the NAAQS, the program "requires that each new or expanded 'major emitting facility' in 'clean air areas' use the 'best available control technology' (BACT) for minimizing additional air pollution [and] also establish[es] 'increments' that limit the cumulative increase in pollution levels over the 'baseline concentrations' in clean air areas." Craig N. Oren, *Prevention of Significant Deterioration: Control-Compelling versus Site-Shifting*, 74 Iowa L. Rev. 1, 3 (1988) (citations omitted). The PSD requirements are supplemental to other obligations under the Act; to comply with its PSD obligations, a facility must also comply with the NAAQS, NSPS, and other statutory standards. 42 U.S.C. § 7475(a)(3).

The PSD provisions establish a pre-construction permitting requirement for new or modified "major emitting facilities." 42 U.S.C. § 7475. *See* 42 U.S.C. § 7479(1); 40 C.F.R. § 51.166(b)(4). "There are in practice two major requirements" for obtaining a permit: installing BACT and demonstrating that applicable PSD increments will not be

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[5] 344 F. Supp. 253 (D.D.C. 1972), *aff'd*, 4 E.R.C. 1815 (D.C. Cir. 1972), *aff'd by equally divided Court sub nom. Fri v. Sierra Club*, 412 U.S. 541 (1973).

[6] *See* 1 William H. Rodgers, *Environmental Law: Air and Water*, § 3.21 (1986).

exceeded. Oren, *PSD*, 74 Iowa L. Rev. at 22-23. The increments are maximum allowable increases and concentrations of designated pollutants that serve to "limit the cumulative increase" in pollutant levels (measured against baseline concentrations specific to each clean air area). 42 U.S.C. §§ 7473, 7479(4). *See* 40 C.F.R. § 51.166(b), (c).[7]

In addition, each major emitting facility to be constructed or modified is "subject to the best available control technology for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility." 42 U.S.C. § 7475(a)(4). Section 169(3) defines BACT as:

> an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility * * * .

42 U.S.C. § 7479(3). EPA regulations and Alaska's federally-approved PSD program reflect the statutory definition. *See* 40 C.F.R. § 51.166(b)(12), § 52.21(b)(12); 18 A.A.C. 50.900(9) (1991). EPA uses the "top-down" approach to determining BACT, as described in the New Source Review Workshop Manual and many permitting decisions. *See In re General Motors, Inc.*, PSD Appeal No. 01-30, 2002

[7] Increments depend on an area's classification. *See* 42 U.S.C. §§ 7472-74. Class I areas, subject to the most stringent increments, include most National Parks and other special federal lands; Class II areas include most "clean air" areas; and Class III areas are permitted the greatest degree of degradation. States may reclassify areas subject to certain limitations.

WL 373982, slip op. at 9 (E.A.B. 2002) (citing decisions).[8] Under that approach, the applicant must identify all "available" technologies; eliminate those shown to be technically infeasible; then select the technology most effective at reducing emissions, unless proven energy, environmental, or economic impacts require its rejection in favor of the next most effective technology. *Id.* at 6 & n.4; *see* J.A. 175-77.[9]

The PSD permitting program may be administered by states with EPA-approved PSD programs or by EPA itself. 42 U.S.C. §§ 7410(a)(2)(C), 7410(c), 7471. *See* 40 C.F.R. §§ 51.166, 52.21, 52.96(a) (Alaska program approval). In either case, PSD permit applications must be reviewed and analyzed "in accordance with regulations promulgated by the Administrator," and there must be a public hearing. 42 U.S.C. §§ 7475(a)(2), 7475(e)(3). Like the NSPS and other CAA requirements for new and modified sources, PSD is a component of EPA's "New Source Review" ("NSR") program. *See* 40 C.F.R. §§ 51.165, 51.166, 52.21, 52.24, Pt. 51 App. S; 67 Fed. Reg. 80,186, 80,187-88 (Dec. 31, 2002). As explained below, as part of the PSD program

[8] The Manual is 1990 draft guidance from the EPA's Office of Air Quality Planning and Standards. As petitioner's staff noted, EPA has "published numerous policy memoranda and guidance documents to assist applicants and permitting authorities in using the top-down approach." J.A. 175.

[9] EPA's Environmental Appeals Board has stated that "a strict application of the top-down methodology" is not mandatory for state permitting authorities, but that in evaluating the "rationality and defensibility of BACT determinations by permitting authorities," EPA has "required an analysis that reflects a level of detail in the BACT analysis comparable to the methodology in the NSR Manual." *In re General Motors*, slip op. at 9 (citing decisions); *see also In re Steel Dynamics*, PSD Appeal Nos. 99-4, 99-5, 2000 WL 833062, slip op. at 25-26 (E.A.B. June 22, 2000) ("top-down analysis is not a mandatory methodology, but it is frequently used by permitting authorities to ensure that a defensible BACT determination, involving consideration of all requisite statutory and regulatory criteria, is reached").

enacted in 1977, Congress gave EPA express authority to take enforcement action to prevent the construction of a facility in violation of the Act. *See* Section 167, 42 U.S.C. § 7477.[10]

The 1990 Amendments. The 1990 amendments expanded the scope of Section 113(a)(5), which now provides: "Whenever, on the basis of any available information, the Administrator finds that a State is not acting in compliance with any requirement or prohibition of the chapter relating to the construction of new sources or the modification of existing sources," the Administrator may issue an order prohibiting the construction or modification of a source, issue an administrative penalty order, or commence a civil action. 42 U.S.C. § 7413(a)(5).[11] Because the PSD program (42 U.S.C. §§ 7470-7492) is part of the designated "chapter" (Chapter 85, 42 U.S.C. §§ 7401-7671(q)), Section 113(a)(5) gives EPA authority to enforce any "requirement" of the PSD provisions.[12]

[10] Congress broadened Section 167 in 1990 to cover facility modifications. *See* 104 Stat. 2399, 2684.

[11] Before 1990, Section 113(a)(5) was limited to violations in nonattainment areas. 42 U.S.C. § 7413(a)(5) (1988).

[12] The 1990 amendments added Title V of the Act, 42 U.S.C. §§ 7661a-7661f, under which each "major source" of air pollutants must obtain an "operating permit" consolidating all its CAA obligations. *See* 42 U.S.C. §§ 7661a, 7661c(a); 40 C.F.R. § 70.1(b); 40 C.F.R. Pt. 70 (EPA Title V regulations); *Virginia v. Browner*, 80 F.3d 869, 873 (4th Cir. 1996). States administering Title V must submit proposed permits to EPA for review. 42 U.S.C. § 7661d(a); 40 C.F.R. § 70.8(a). If EPA objects within 45 days that the permit "is not in compliance with the requirements of [the CAA]," the permitting authority "may not issue the permit." 42 U.S.C. § 7661d(b)(1)-(2), (c); 40 C.F.R. § 70.8(c). Unless the deficiency is cured, EPA "shall issue or deny the permit in accordance with the requirements" of the CAA. 42 U.S.C. § 7661d(c). EPA may "terminate, modify, or revoke and reissue" operating permits. 42 U.S.C. § 7661d(e). Cominco applied for a Title V permit for the Red Dog Mine on December 8, 1997; petitioner has not yet acted on the application. *See* Alaska Dep't of Environmental Conservation, *available at* www.state.ak.us/dec/dawq/aqm/sched.xls (permit review status for permit application No. 290) (last visited June 27, 2003).

SUMMARY OF ARGUMENT

The Act's language, structure and history demonstrate that EPA may enforce the substance of the BACT requirement when a state has failed to do so. Petitioner wrongly portrays BACT as a kind of legislative afterthought that gives states "sole discretion" (Br. 27) to allocate pollution-control burdens, subject only to procedural requirements and ambient air quality standards like the PSD increments. In fact, however, BACT is an essential feature of the PSD program, intended to provide pollution controls beyond those necessary to comply with the PSD increments and other air quality standards. *See* 42 U.S.C. § 7475(a). Congress intended BACT to "force" the adoption of new control technologies, to counter states' tendency to under-protect air quality in order to attract or keep industry, and to preserve air quality in adjacent states and on special federal lands such as National Parks. *See* 42 U.S.C. § 7470.

In Sections 113(a)(5) and 167, Congress gave EPA authority to take enforcement action when the agency concludes that a proposed major emitting facility fails to meet any "requirement" of the PSD program. A facility's obligation to install BACT is such a requirement, and the legislative history of the 1977 amendments pointedly confirms EPA's enforcement authority.

EPA has long acknowledged that state permitting authorities have discretion in determining BACT, and has disclaimed any power to "second-guess" reasonable state judgments. But that discretion is not a license to ignore the statutory text or BACT's intended function in the PSD program. Petitioner's account of BACT as hopelessly standardless (Br. 24) is incompatible with the statutory text and BACT's technology-forcing function. Its argument that EPA's remedy for an arbitrary BACT determination is to seek state review would, without statutory warrant, create an anomalous system for enforcement of a federal statute.

In issuing Cominco's PSD permit, petitioner acted inconsistently with its own determinations that Selective

Catalytic Reduction ("SCR") technology is far more protective of the environment than the Low NOx technology petitioner ultimately endorsed, and that SCR is technically feasible and economically affordable. Petitioner based its decision on vague and undocumented concerns about "socioeconomic impacts" and "world competitiveness," reasoning that would eviscerate the BACT requirement. EPA acted within its express statutory powers in taking enforcement action.

ARGUMENT

I. EPA HAS STATUTORY AUTHORITY TO ENFORCE THE SUBSTANCE OF THE BACT REQUIREMENT[13]

A. The Plain Language of the Act's Enforcement Provisions Authorizes EPA to Enforce Any PSD "Requirement."

Statutory construction "begins" with the statutory text and "ends there as well" when the text yields a "clear answer." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432,

[13] The court below (Pet. App. 18a) concluded that EPA's orders represented "final action" reviewable under 42 U.S.C. § 7607(b)(1). A panel in another circuit has since held EPA compliance orders non-final and unreviewable, reasoning that the CAA cloaks such orders with serious legal consequences without giving regulated entities a meaningful opportunity to challenge their factual or legal basis. *Tennessee Valley Auth. v. Whitman*, ___ F.3d ___, 2003 WL 21452521 (11th Cir. June 24, 2003). In our view, the *TVA* decision is faultily reasoned. The Act does not support the panel's pivotal conclusion (*id.* at **17-18) that Congress sought to preclude parties from disputing the factual or legal foundation of EPA compliance orders in judicial enforcement proceedings. Here, by comparison, the Ninth Circuit construed the statute to require review of the underlying merits of the EPA compliance orders and directed the Agency to submit a complete administrative record for review by the court of appeals, withdraw its orders, or file an enforcement action in district court. Pet. App. 22a.

438 (1999). A statute "is to be read as a whole, since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991).

The Act provides a "clear answer" to the question of EPA enforcement authority presented here. The orders EPA issued to Cominco on February 8 and March 7, 2000, J.A. 253, 260, 264, and the December 10, 1999 finding and order issued to petitioner, Pet. App. 26a, 36a, were authorized under Section 167, 42 U.S.C. § 7477, which allows EPA to enforce by administrative order or otherwise "the requirements" of the Act's PSD provisions. Section 167 provides:

> The Administrator shall, and a State may, take such measures, including issuance of an order, or seeking injunctive relief, as necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of [part C, codifying the PSD program].

EPA likewise had express statutory authorization for these actions under Section 113(a)(5) of the Act. Section 113(a)(5) authorizes EPA to take enforcement action when it finds that a state "is not acting in compliance with any requirement or prohibition of [the CAA] relating to the construction of new sources[.]" 42 U.S.C. § 7413(a)(5). The enforcement power delegated to EPA includes issuing an order "prohibiting the construction or modification of any major stationary source." *Id.* On April 25, 2000, EPA, however, withdrew the order portion of the December 10 document issued to petitioner, because petitioner had already (and in defiance of EPA's action) issued Cominco a PSD permit. Pet. App. 19a; J.A. 300.

B. BACT Is Integral to the Act and Is a Binding National "Requirement."

Confronted with statutory language plainly authorizing EPA to enforce PSD "requirements" and requiring new and modified major emitting sources to install BACT,

petitioner is forced to argue that the "only 'BACT requirement' pertinent here" is the requirement that a permit "contain a BACT limitation devised by the state after considering the applicable factors." Pet. Br. 22. Petitioner thus maintains that as long as the state reaches *some* BACT determination and complies with the PSD permitting procedures, and as long as the facility will not exceed the governing ambient air quality standards (such as the PSD increments and NAAQS), the state has necessarily complied with the Act. Pet. Br. 22-23. As for the substance of the BACT requirement, petitioner's position is: *De gustibus non est disputandem*. The BACT determination, petitioner asserts, is fraught with "case-specific policy judgments" that make it as subjective and standardless as "asking different people to pick the 'best' car." Pet. Br. 24.

All this bears little resemblance to that requirement as established by Congress. Reading petitioner's account, one might forget that the Act "requires" BACT in order "to minimize emissions." S. Rep. No. 95-127 at 29 (1977). It does not subject facilities to "whatever-technology-the-state-adopts-after-holding-a-hearing-and-discussing-the-statutory-factors." *Cf. Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978) (noting "essentially procedural" nature of National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*). Instead, it subjects facilities to "the best available control technology," 42 U.S.C. § 7475(a)(4). The text rebuts petitioner's claim (Br. 25-26) that the BACT standard is one of uncabined subjectivity: BACT is "an emission limitation based on the *maximum degree of reduction* of each pollutant * * * which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is *achievable* for such facility[.]" 42 U.S.C. § 7479(3) (emphases added). The strong, normative terms "maximum" and "achievable" – also used in the 1977 amendments' standards for new sources in nonattainment areas, 42 U.S.C. §§ 7501(3), 7503(a)(2) ("lowest achievable emission rate"), and the Act's technology-based standard for hazardous emissions (42 U.S.C. § 7412(d)(2) ("maximum

degree of reduction * * * achievable") – are inconsistent with petitioner's reading of BACT as inviting the freedom and even caprice of consumers making automotive purchases.

When the 95th Congress wanted to restrict EPA's authority to enforcing "procedural" requirements, it knew how to say so. *See* 42 U.S.C. § 7474(b)(2) (EPA may reject state's redesignation of PSD area classification if "such redesignation does not meet the procedural requirements of this section"). No such limitation, however, is found in Sections 113(a) or 167.[14] This is unsurprising: Given BACT's centrality to the PSD program, it would have been odd for Congress to have empowered EPA to block construction due to a faulty hearing but not an arbitrary choice of control technology.

Petitioner's understanding (Br. 22) of the BACT "requirement" as purely procedural is not shared by the courts, administrative agencies, or Congress. The leading decision refers to "BACT requirements" and to BACT as "[o]ne of the principal substantive prerequisites to obtaining a PSD permit," *Alabama Power Co. v. Costle*, 636 F.2d 323, 358, 407 (D.C. Cir. 1980); EPA's and petitioner's regulations refer to "BACT requirements," *e.g.*, 40 C.F.R. §§ 51.166(s)(4); 52.21(v)(4); 18 A.A.C. 50.375, and the 1977 Senate Report refers to BACT (S. Rep. No. 95-127 at 12) as a "national requirement" and confirms that EPA may "go to court to stop a permit for activities which * * * did not comply with the requirements of this section, including the use of best available control technology." BACT is a

[14] The Title V provisions authorizing EPA to block proposed operating permits, 42 U.S.C. § 7661d(b), similarly fail to restrict EPA to "procedural" violations of the PSD provisions, indicating that Congress in 1990 did not accept petitioner's view that the substance of BACT determinations lies within the "sole discretion" of the state.

substantive standard that states consenting to implement the PSD program must apply, not just consider. *Cf. FERC v. Mississippi*, 456 U.S. 742, 764 (1982). It is no less a "requirement" than the Act's other technology-forcing obligations, like "lowest achievable emission rate," 42 U.S.C. § 7503(a)(2), or "best system of emission reduction * * * adequately demonstrated," *id.* § 7411(a).

While making liberal use of the 1977 legislative history for the undisputed point that states with approved PSD programs determine BACT (Pet. Br. 18, 30-33), petitioner ignores passages that expressly confirm EPA's oversight and enforcement authority. The same 1977 Senate Report that rates a "passim" in petitioner's brief explains that:

> *The [EPA] Administrator's role is one of monitoring state actions. States have authority to issue construction permits to new major emitting facilities in clean air areas. The Administrator thus could go to court to stop a permit for activities which would exceed the increments of pollution or which otherwise did not comply with the requirements of this section [setting forth the PSD program], including the use of best available control technology.* But the Administrator could not and should not attempt to burden this section with unnecessary regulations and guidelines.
>
> The Administrator should tell the States the basis for his review. When asked, [EPA] should become involved at an early date in particularly difficult permit applications so that States and localities will know of any potential differences.

S. Rep. No. 95-127 at 12 (emphasis added).[15]

[15] *See also* S. Rep. No. 95-127 at 36 (Administrator may take "measures that would be necessary to prevent the issuance of a permit

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Despite statutory text and legislative history confirming EPA's enforcement authority, petitioner insists the PSD program is part of an "overall approach" (Br. 26) in the Act in which EPA sets "national standards to achieve and maintain clean air," and states "decide how to allocate the available increments among competing sources." Pet. Br. 17. Similarly, petitioner argues (Br. 27), the PSD increments are analogous to the NAAQS and the BACT determination resembles states' authority under the 1970 amendments to select "whatever" controls they choose (*Train*, 421 U.S. at 79) for existing sources as long as the federal air quality standards are satisfied.

For new and modified facilities, the Act's "overall approach" has never been as petitioner describes. To the contrary, the 1970 amendments not only established the nationwide NSPS (*supra*, p. 4), but also called for technology-forcing emissions limitations for hazardous air pollutants (as amended, 42 U.S.C. § 7412), automobiles (42 U.S.C. §§ 7521-7544), and aircraft (42 U.S.C. § 7571). In 1977, Congress added new national, technology-based standards for new and modified stationary sources in both "clean air" areas, *supra*, pp. 5-7, and nonattainment areas, 42 U.S.C. § 7502(c).[16] A structure combining technology-forcing federal

for a new source if it did not comply with the [PSD] requirements"); H.R. Rep. No. 95-564 at 153 (1977) ("The Administrator shall issue orders and seek other action to prevent the issuance of an improper permit."). As Senator Muskie put it: "Once a State adopts a permit process in compliance with this provision, [EPA's] role is to seek injunctive relief or other judicial relief to assure compliance with the law." 123 Cong. Rec. S9169 (daily ed. June 8, 1977).

[16] Petitioner is again off the mark when it suggests (Br. 26-27) that the early NAAQS/SIP model represents some universal template for federal-state relations under the federal environmental statutes. Federal-state relationships vary enormously both between statutes and within particular statutory schemes on basic matters like standard-setting,

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standards and optional state implementation backed by EPA enforcement authority – rather than open-ended state discretion – has been the Act's "overall approach" for new and modified sources.

Mischaracterizing BACT as (at best) a mechanism for states to meet the PSD increments, petitioner disregards the intended function of the BACT requirement and its centrality to the PSD program. The 1977 amendments establish a "*national requirement that each new major facility to be located in a clean air area install the best available control technology.*" S. Rep. No. 95-127 at 12 (emphasis added). Facilities' obligation to install BACT is separate and distinct from their obligation to comply with the PSD increments: Each major emitting source that complies with the increments must *also* implement BACT. *See* 42 U.S.C. § 7475(a).[17] Because pollution controls "ultimately determine the emissions from a source, an accurate BACT analysis is essential to a successful PSD review." National Comm'n on Air Quality ("NCAQ"), *To Breathe Clean Air* at 157 (1981).[18] BACT was specifically intended to produce pollution control beyond that necessary to meet the PSD increments: As explained in the Senate Report, BACT would compel the "rapid adoption of improvements in technology as new sources are built," while the increments would operate as a "second level of protection" and a "second stimulant to improved controls" on air pollution. S. Rep. No. 95-127 at 18.[19] Petitioner's treatment of BACT goes far toward reading it out of the statute.

An independent BACT requirement is essential to maintaining the increments themselves. Congress adopted BACT in part to "minimize the consumption of PSD increments and thus expand the affected area's potential for future economic growth." NCAQ, *To Breathe Clean Air* at 157. "If the allocation were left entirely to the states, they might give the whole pie to the first comers and create irresistible pressures to relax the ambient limits themselves." Currie, *Air Pollution*, § 7.08 at 7-21. *See also* 122 Cong. Rec. S3905 (March 22, 1976) (BACT would "prevent the first source moving into an area from using up the full increment") (quoting article by Sen. Domenici); S. Rep. No. 95-127 at 31.[20]

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program approval and revocation, permitting authority, enforcement, and preemption. *See Symposium: Environmental Federalism*, 54 Md. L. Rev. 1141 (1995).

[17] Reviewing a state's BACT determination, EPA Administrator Reilly rejected a similar argument, explaining that the Act "separates issues of overall air quality from issues of technology" and that, in contrast to the requirements that facilities comply with the increments, BACT is "principally a technology-forcing measure that is intended to foster rapid adoption of improvements in control technology." *In re Columbia Gulf Transmission Co.*, PSD Appeal No. 88-11, 1989 WL 266361 (E.A.B. 1989). "Both of these provisions," the Administrator explained, "must be satisfied by an applicant seeking a PSD permit, and compliance with one provision does not relieve or lessen an applicant's burden of complying fully with the other." *Id.*

[18] The NCAQ was established by 1977 amendments to undertake an independent analysis of air pollution programs. 91 Stat. 685, 785 (1977).

[19] By prescribing the category-wide NSPS as a minimum for BACT, 42 U.S.C. § 7479(3), the statutory PSD program ended EPA's prior practice of equating BACT with NSPS. *See* Craig N. Oren, *Clearing the Air*, 9 Va. Envtl. L.J. 45, 75 (1989).

[20] Indeed, the NCAQ found that "a program requiring best available control technology alone (without the increment system) would result in emissions growth equivalent to that obtained through the current program with increments, if best available control technology determinations were made in a manner consistent with its current definition." NCAQ, *To Breathe Clean Air* at 23. *See* Rodgers, *Environmental Law*, at

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Congress intended BACT, as "[p]ossibly the most important" of the 1977 Act's many technology-fostering measures, to spur "improvements in the technology of pollution control."[21] Petitioner's treatment of BACT as a "subjective" appeal to states' "sole discretion" ignores the technology-forcing philosophy that was "fundamental" to the adoption of BACT and congressional efforts throughout the 1977 amendments "to accelerate technological innovation in the control of air pollution." S. Rep. No. 95-127 at 10. A scheme that gave states unfettered discretion to adopt pollution control technologies for particular sources would not perform this vital "forcing" function. *See Union Elec.*, 427 U.S. at 257. Had BACT been left to states' "sole discretion" (Pet. Br. 27), it would have done little. Before 1977, states already had ample authority under their police powers and the CAA's savings clause (42 U.S.C. § 7416) to impose more stringent emissions limitations on new and modified sources in clean air areas. A federally unenforceable invitation to consider various factors would have provided states no new incentive to force development of new control technologies.

Petitioner's approach is also at odds with Congress's intent through the PSD program to insure that "economic

375-76 (NCAQ study suggests that "BACT is the cake and the increments the mere frosting").

[21] S. Rep. No. 95-127 at 17-18. *See* 42 U.S.C. §§ 7501(3), 7503(a)(2) ("lowest achievable emission rate" for new sources in nonattainment areas), 7502(c)(1) ("reasonably available control technology" for existing sources in nonattainment areas), 7491(g)(2) (requiring "best available retrofit technology" for existing sources impairing visibility in national parks and certain other clean air areas); *In re Columbia Gulf Transmission Co.*, 1989 WL 266361 at *3 (discussing BACT's "technology-forcing" role). The Senate Report noted that the technology-forcing provisions of the 1970 amendments had brought about "positive changes" by stimulating "more effective, less-costly systems to control air pollution." S. Rep. No. 95-127 at 17-18.

growth will occur in a manner consistent with the preservation of existing clean air resources," 42 U.S.C. § 7470(3), and "to prevent competition for industry to be waged among States on the basis of air quality." H.R. Rep. No. 95-294 at 141 (1977). *See Hodel v. Virginia Surface Min. and Reclamation Ass'n, Inc.*, 452 U.S. 264, 282 (1981). "Without national guidelines for the prevention of significant deterioration," legislators feared, firms would "play one State off against another with threats to locate in whichever State adopts the most permissive pollution controls." H.R. Rep. No. 95-294 at 134. The PSD program was intended to forestall a "flight of industry – and jobs" from dirty-air to relatively clean air areas, and "to protect States choosing to retain clean air resources from 'environmental blackmail' by industrial sources that may attempt to play one State off another with threats to locate or relocate plants in States with weaker environmental requirements." *Id.* at 133, 140. Leaving the states, as petitioner urges, with "sole discretion" to select their own version of the "best" technology would reinforce the interjurisdictional pressures Congress was trying to restrain. State permitting authorities would scarcely take an ambitious view of what level of control technology is "achievable" if they knew that competing states had "sole discretion" to choose their own versions of BACT. Indeed, the National League of Cities and the National League of Counties supported the 1977 PSD legislation precisely because of "the competitive struggle that exists among States and localities for new industry." H.R. Rep. No. 95-294 at 133, 135, 152, 202.

Finally, giving states "sole discretion" over the substance of control technology choices is in tension with Congress's intent through the PSD program to protect federal parklands, wilderness areas, and other areas of "special national or regional *** value," 42 U.S.C. § 7470(2), as well as the air resources of neighboring states, *id.* § 7470(4). *See* Craig N. Oren, *The Protection of Parklands from Air Pollution: A Look at Current Policy*, 13 Harv. Envtl. L. Rev. 313, 321-27 (1989). Congress had

time-tested reasons to provide for a federal "backup" role regarding state BACT determinations: States have limited incentives to protect resources belonging to the nation as a whole or to other states. *See Missouri v. Holland*, 252 U.S. 416, 435 (1920); *Missouri v. Illinois*, 200 U.S. 496, 520-21 (1906); *McCulloch v. Maryland*, 17 U.S. 316, 431-35 (1819). *See also* 42 U.S.C. § 7474(b) (federal land manager's role in state reclassification decisions). By denying federal enforcement authority, petitioner again attributes to Congress a "conspicuous[ ] fail[ure]" to "provide EPA with the authority needed to achieve the statutory goals." *E.I. Du Pont De Nemours & Co. v. Train*, 430 U.S. 112, 133 (1977).[22]

C. The "Case-by-Case" Nature of Permitting Authorities' BACT Determinations Does Not Defeat EPA's Enforcement Authority.

Despite the plain statutory language establishing EPA's authority to enforce PSD requirements, petitioner attempts to create an exemption to the text by arguing (Br. 21-22, 28-29) that the "case-by-case" nature of the BACT determination shows that Congress intended to commit the substance of BACT entirely to states. But, in fact, the facility-specific BACT inquiry was intended to produce more effective pollution control and accommodate local differences in raw materials or plant configuration that might make a technology "unavailable" in a particular area. Case-by-case BACT evaluation ensures that permits

[22] The importance of a federal oversight role is particularly apt in this case: The Red Dog Mine is located in an otherwise pristine and scenic region of Alaska, five miles from the Noatak National Preserve, which protects a spectacular mountain-ringed river basin containing an intact Arctic ecosystem. According to the National Park Service, which is responsible for managing the Preserve, vegetation in the area is likely to be sensitive to nitrogen deposition. *See* J.A. 228, 284.

incorporate "the latest technological developments," in contrast to "the stagnation that occurs when everyone works against a single national standard for a new source." S. Rep. No. 95-127 at 18. Whereas the rigid NSPS standard "must take into account what is best for the weakest performer in a category," case-by-case identification of BACT "can take advantage of the control potential of the particular proposed source." Oren, *PSD*, 74 Iowa L. Rev. at 33. It was not intended to give states "sole discretion" to subordinate air quality to other priorities.

BACT determinations are guided by administrable factors – "maximum" pollution reductions, consideration of energy, environmental, and economic impacts, and specified abatement techniques. 42 U.S.C. § 7479(3). The case-by-case application of these factors resembles other determinations that agencies and courts regularly confront; it may not always point to a "single, objectively 'correct' BACT determination" (Pet. Br. 23), but it does rule out a range of *unreasonable* determinations that if adopted present appropriate occasions for EPA action. Certainly nothing about BACT makes it so unsuited to EPA review as to require the manufacture of an implied exception to EPA's enforcement authority.

Similarly groundless is petitioner's effort (Br. 25) to elicit from Congress's reference to the "permitting authority" – usually the state, but not infrequently EPA itself – an implied intent to preclude EPA enforcement. Had Congress wished to foreclose EPA oversight, it readily could have so provided. But Sections 113(a)(5) and 167 empower EPA to enforce the "requirements" of the PSD provisions, and neither contains any limitation for BACT or for state-issued permits. To be sure, Congress intended to allow states with EPA-approved PSD programs to

determine BACT for individual sources, a function previously performed by EPA alone (S. Rep. No. 95-127 at 8).[22] But it does not follow that Congress thereby intended to exempt states from EPA enforcement. Sections 113(a)(5) and 167 show that it did not. *See also* S. Rep. No. 95-127 at 36 ("Once the State submits an adequate [PSD program], [EPA's] role is restricted to assuring compliance with the law.").

D. EPA Has Understood its Limited Role in Reviewing State PSD Determinations, and Disavowed any Power to "Second-Guess" Reasonable State BACT Determinations.

Petitioner is off the mark when it accuses EPA of asserting a power to "second-guess" petitioner's BACT determination. *See* Pet. Br. i, 21, 35. EPA has long acknowledged that its enforcement authority respecting BACT is circumscribed. Memorandum from Michael S. Alushin, Associate Enforcement Counsel for Air (July 15, 1988) (J.A. 272-73) (recognizing that BACT determination involves "the exercise of judgment," but stating that EPA may pursue enforcement action if determination is "not based on a reasonable analysis"). EPA has disavowed any power to "second-guess" state BACT determinations, and has repeatedly acknowledged its limited oversight and

[22] EPA has not contended that Sections 113(a) and 167 "require EPA approval" (Pet. Br. 25) of state BACT determinations. Instead of *requiring* EPA to approve BACT determinations, Sections 113(a)(5) and 167 *authorize* EPA to act in those rare instances when a state has acted arbitrarily. *See, e.g.*, 57 Fed. Reg. 28,093 (June 24, 1992) ("EPA acknowledges that states have the primary role in administering and enforcing the various components of the PSD program. States have been largely successful in this effort, and EPA's involvement in interpretative and enforcement issues is limited to only a small number of cases.").

enforcement role.[24] It adhered to that limited role here, explaining why petitioner's BACT determination was "arbitrary" and contrary to petitioner's own findings. J.A. 149-50. EPA's limited but vital role in enforcing BACT is consistent with a scheme that "places primary responsibilities and authority with the States, backed by the Federal Government." S. Rep. No. 95-127 at 29.

Nor is there merit to petitioner's warning that EPA could upset state BACT determinations "months, even years, after a permit has been issued." Pet. Br. 35. EPA's exercise of its enforcement powers is subject to judicial review. *See* 42 U.S.C. §§ 7607(b)(1), 7413(b). EPA could not engage in the conduct hypothesized by petitioner while the federal courts sit to review EPA's actions. *See Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting). *Cf. United States v. AM General Corp.*, 34 F.3d 472, 475 (7th Cir. 1994) (upholding dismissal of enforcement action where EPA did not act until well after facility received PSD permit and completed plant modifications).

[24] As it noted in approving Virginia's PSD program, "EPA may not intrude upon the significant discretion granted to states under new source review programs, and will not 'second guess' state decisions." 63 Fed. Reg. 13,795, 13,796 (March 23, 1998). EPA inquires whether the state's decision rested "on reasonable grounds properly supported on the record, described in enforceable terms, and consistent with all applicable requirements." *Id. See also, e.g.*, 58 Fed. Reg. 15,422, 15,426 (March 23, 1993).

E. Relegating EPA to an Appeal Before a State Agency or Court Is Inconsistent With the Statute and Would Create an Ungainly Procedure for EPA Oversight and Enforcement.

There is nothing unduly "awkward[ ]" (Pet. Br. 19) about Congress's decision to subject states' decisions in implementing the PSD program to EPA's oversight and enforcement authority, to be followed by an opportunity for federal judicial review of any final EPA actions in particular instances. Such policy considerations are no defense against plain statutory language. *See* 42 U.S.C. §§ 7413(a)(5), 7477; Rodgers, *Environmental Law*, § 3.36 at 523 ("For better or worse, this forum that places EPA in an appellate position reviewing 'major' state permits is the principal source of recorded law on compliance orders.")

Nor is there anything unusual about authorizing EPA (subject to judicial review) to oversee state implementation of the BACT requirement. Similar federal oversight roles abound under the CAA and other federal statutes. EPA reviews SIPs, and federal courts of appeals then review EPA's actions, *see* 42 U.S.C. § 7410(a), (k); 42 U.S.C. § 7607(b)(1); *Union Elec.*, 427 U.S. at 252, even though those state plans involve discretion-laden policy judgments. Section 209(b)(1) of the CAA provides that the Administrator shall deny a state's request for a waiver of the Act's preemption of state auto emissions standards if EPA concludes that the state's determination that conditions for a waiver exist is "arbitrary and capricious," 42 U.S.C. § 7543(b)(1). *See Motor and Equipment Mfrs. Ass'n, Inc. v. EPA*, 627 F.2d 1095 (D.C. Cir. 1979). Under the Clean Water Act, federal courts review EPA's decisions to approve or set aside state-promulgated water quality standards. *See* 33 U.S.C. § 1313(c); *American Wildlands v. Browner*, 260 F.3d 1192, 1196 (10th Cir. 2001).

Indeed, it is petitioner's alternative enforcement scheme that diverges from the norm under federal environmental laws. Petitioner (Br. 23) acknowledges that EPA

itself can take "appropriate action" under Sections 113(a)(5) and 167 when a state has failed to issue *any* BACT determination; granted a permit that allows violations of NSPS or ambient standards; denied a hearing; or failed to conduct the statutorily required analysis of the proposed source. After a discreet interval of pages, however, petitioner asserts (Br. 36) that, if EPA disputes the *substance* of a state BACT determination, its only recourse is to file a state administrative appeal and seek review in state court. Petitioner does not explain whether the state court then would apply federal law, some unspecified state law, or whether (as petitioner elsewhere suggests, Pet. Br. 24-25) the BACT definition simply has no legally binding substance (rendering *any* appeal a fool's errand). In any event, petitioner complains (Br. 19, 36, 37) that EPA improperly "bypassed" or "short-circuited" this putative review scheme.

Congress has not traditionally been in the practice of subjecting federal agencies charged with enforcing federal law to exclusive state jurisdiction. *Cf. AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 378 n.6, 385 n.10 (1999).[25] Among other defects, petitioner's approach would require EPA to litigate in two fora at once – federal courts for procedural violations, and state courts for claims of substantively unlawful misapplications of the BACT standard. Such a scheme would hardly conduce to "certainty

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[25] We are aware of no comparable regime in any federal environmental statute. The McCarran Amendment, 43 U.S.C. § 666, contains an express waiver of federal immunity and rests on considerations unique to general water rights adjudications. *See Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 571 (1983). State water quality certifications under Section 401 of the Clean Water Act are reviewable only in state court, but Section 401 expressly incorporates state law, 33 U.S.C. § 1341(d). *See PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700 (1994). BACT determinations, by contrast, rest exclusively on federal law.

and finality" or "cl[arity]" (Pet. Br. 35, 36) in the permitting process. The statute refutes petitioner's contention that the same Congress committed the core of the BACT decision – the choice of control technology and explanation for that choice – to the unreviewable discretion of state agencies and courts.[26]

II. EPA PROPERLY DETERMINED THAT THE PERMIT ISSUED BY PETITIONER IS ARBITRARY AND INCONSISTENT WITH THE ACT

The question presented is whether EPA has the "authority" to take enforcement action with respect to the Red Dog PSD permit. Pet. *i*. As demonstrated, the answer to that question is affirmative. The Court need not reach the further issue whether EPA properly exercised its authority on the facts here. If the Court does address that issue, however, petitioner's own reasoning demonstrates that its BACT determination for MG-17 violated the statute. Under the top-down approach petitioner purported to apply, *see* J.A. 62, 109, 176, petitioner repeatedly determined, and still does not dispute, that SCR is between two and three times as effective as "Low NOx" technology at reducing NOx emissions. *See* J.A. 188-89 (SCR achieves 80-90% reductions in emissions); J.A. 191 (30% for Low NOx); *see also* J.A. 65, 110, 181. Tracking the statutory factors, 42 U.S.C. § 7479(3), top-down analysis proceeds to consider whether the top-ranked technology is

[26] 42 U.S.C. §§ 7413(a)(5), 7477. *See also* S. Rep. No. 95-127 at 12. Petitioner also points (Br. 38) to language ensuring "interested persons including representatives of the Administrator" an opportunity to participate in PSD permit hearings. 42 U.S.C. § 7475(a)(2). This language guarantees EPA a chance to participate in state hearings, thereby encouraging early mediation of any disagreements with the state. *See* S. Rep. No. 95-127 at 12. It does not, however, purport to limit the enforcement authorities described in Sections 113(a)(5) and 167.

technically and economically feasible. Petitioner established that SCR was technically feasible and never deviated from this finding. *See* J.A. 65, 80, 181.[27] On May 4, 1999, petitioner found that SCR was also economically feasible, with a control cost effectiveness of about $1600 per ton, well within the established range for NOx BACT determinations. J.A. 83.

At Cominco's urging, however, petitioner reversed course in its September 1, 1999 report, this time deeming SCR's costs "excessive." J.A. 116. Petitioner, however, never significantly altered its estimate that SCR cost-effectiveness was about $2000 per ton nor disputed that this value fell within the established range for NOx BACT. J.A. 113, 204. Cominco never presented any evidence that the capital cost of SCR would seriously impair the profitability of the mine, and refused to provide this information when EPA requested it.[28] In its final report, petitioner stated that "[a]nother perhaps better way to determine BACT is for the applicant to present detailed financial information showing its effect on the operation. However,

[27] In its September 28, 1999 letter to petitioner, EPA informed petitioner that Wartsila, the manufacturer of Cominco's generators, had provided it with a list of 33 facilities that had installed SCR on more than 50 of their engines. J.A. 124.

[28] It is not self-evident that installing SCR would adversely affect Cominco's "competitiveness," let alone the regional economy. Cominco's 1999 annual report lists its revenues as $1.645 billion, and its operating profits from zinc operations as $234 million. *See* 1999 Annual Report, *available at* http://www.teckcominco.com/investors/reports/clt/clt-99-ar.pdf (last visited June 26, 2003). The report described the Red Dog Mine as the company's "flagship operation," holding "approximately 23% of the world's zinc mine reserves," the "largest and richest ever discovered," and "key" to Cominco's "strategic efforts to become the world's lowest cost and most profitable zinc producer." *Id.* at p. 2. Teck-Cominco's annual report lists its 2002 revenues as $2.187 billion. *See* 2002 Annual Report, *available at* http://www.teckcominco.com/investors/reports/ar2002/tc-2002-highlights.pdf (last visited June 26, 2003).

the applicant did not present this information. Therefore, no judgment can be made as to the impact of a $2.1 million control cost on the operation, profitability, and competitiveness of the Red Dog Mine." J.A. 116; *see also* J.A. 207.

To explain its about-face, petitioner stated that Cominco's mine provides jobs in a depressed region, and that the ongoing expansion ensured that it "will continue to influence and benefit the residents and the economy of this region." J.A. 208.[29] Petitioner explained that it had "chosen to consider the direct cost of SCR technology and its relationship to retaining the Mine's world competitiveness as it relates to community socioeconomic impacts for the foremost consideration to judge economic impacts." J.A. 208. In this opaque language lurk rationales that would, if tolerated, eviscerate the PSD program. First, petitioner's reliance on competitiveness impacts and job losses was baseless given its statement a page earlier that "*no judgment can be made* as to the impact of a $2.1 million control cost on the operation, profitability, and

[29] Petitioner (Br. 13) also reprises an argument it expressly rejected in the permitting proceedings, namely, that Cominco's agreement to install Low NOx on existing generators MG 1, 2, 3, and 5, meant that the net emissions of the project as permitted were lower than if Cominco had installed SCR on MG 17 only. As EPA explained (J.A. 96-97) and as petitioner acknowledged (J.A. 111-12, 199), the CAA and implementing regulations do not allow for such an approach. "Netting" can be used to exempt modified sources from PSD review requirements if there will be no significant project-wide increase in emissions. *See* 40 C.F.R. § 51.166(b)(3), 40 C.F.R. § 52.21(b)(2)(i). Cominco, however, was proposing an expansion that would result in a net increase in NOx emissions of 1100 tons per year. J.A. 169. (The BACT threshold for NOx emissions is 40 tons per year.) Furthermore, Cominco had an independent legal imperative to install Low NOx controls on units 1,2,3 and 5. Once Cominco sought to have the operating caps removed from these units, leading to pollution increases, it had to use low-NOx technology to keep pollution from these units below previously permitted levels. J.A. 139. Had Cominco declined to do so, these units would have been independently subject to BACT. J.A. 129, 139.

competitiveness of the Red Dog Mine." J.A. 207. More fundamentally, petitioner's stated grounds for decision are contrary to the statute's focus on what is "achievable" and BACT's intended function as a meaningful technology-forcing standard to counter interstate competitive pressures to lower air quality requirements. *Supra*, p.19.

If states could reject effective and "available" technologies based on undocumented claims about "boost[ing]" the local economy and "world competitiveness" (J.A. 207-208), the BACT requirement would mean little. Surely *most* "major emitting facilities" – which by definition emit hundreds of tons of pollutants per year, *see* 42 U.S.C. § 7479(1), and under the instant permit, almost 4000 tons per year of NOx, J.A. 156-57 – are subject to "world competition." By relying on the massive Red Dog facility's "socioeconomic impacts," petitioner flouted Congress' intent in the PSD program "to identify facilities which, due to their size, are financially able to bear the substantial regulatory costs imposed by the PSD provisions and which, as a group, are primarily responsible for emissions of the deleterious pollutants that befoul our nation's air." *Alabama Power,* 636 F.2d at 353. The Act cannot be read to excuse facilities from installing effective control technology by invoking competitive conditions that are ubiquitous in a market economy.

Petitioner changed course based on a desire to "support Cominco's Red Dog Mine Production Rate Increase Project, and its contributions to the region" and to reward Cominco for its "unique and continuing impact on the economic diversity of this region[.]" J.A. 208. Whatever the precise contours of permitting authorities' discretion, concerns like these cannot be lawful rationales to reject otherwise more effective and available control technologies. States then would have unbridled discretion to adopt dramatically less effective control technologies based on a bare desire to reward local businesses. Petitioner's solicitude for a local company at the expense of air quality illustrates the kinds of local pressures that led Congress to

impose BACT as a "national requirement," *supra*, p. 16, and stands as an example of why the EPA enforcement authority expressly provided for in Sections 113(a) and 167 of the Act is essential in maintaining the integrity of the PSD program.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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